

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of)

Inquiry Concerning the Deployment of)
Advanced Telecommunications Capability to)
All Americans in a Reasonable and Timely)
Fashion, and Possible Steps to Accelerate)
Such Deployment Pursuant to Section 706)
of the Telecommunications Act of 1996,)
As Amended by the Broadband Data)
Improvement Act)

GN Docket No. 09-137

A National Broadband Plan for Our Future)

GN Docket No. 09-51

REPLY COMMENTS OF SUNESYS, LLC

Respectfully submitted,

SUNESYS, LLC

Alan G. Fishel
Jeffrey E. Rummel
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Dated: September 4, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

)	
In the Matters of)	
)	
Inquiry Concerning the Deployment of)	GN Docket No. 09-137
Advanced Telecommunications Capability to)	
All Americans in a Reasonable and Timely)	
Fashion, and Possible Steps to Accelerate)	
Such Deployment Pursuant to Section 706)	
of the Telecommunications Act of 1996,)	
As Amended by the Broadband Data)	
Improvement Act)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	

COMMENTS OF SUNESYS, LLC

Sunesys, LLC (“Sunesys”) hereby submits its comments in response to the Notice of Inquiry (the “NOI”) in this proceeding. In this proceeding, the Commission has sought comments regarding, “What actions, if any, should the Commission take to accelerate broadband deployment.”¹ One such critical action is to impose a time period for the issuance of pole attachments. For all of the reasons set forth in the attachments, such a time period is urgently needed, and will accelerate broadband deployment, which is being stifled by delays relating to the issuance of pole attachment permits.

¹ NOI at ¶ 33.

Respectfully submitted,

SUNESYS, LLC

A handwritten signature in black ink, appearing to read "Alan G. Fishel", with a stylized flourish at the end.

Alan G. Fishel

Jeffrey E. Rummel

Arent Fox LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5339

(202) 857-6000

Dated: September 4, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

A National Broadband Plan for Our Future)
_____)

GN Docket No. 09-51

COMMENTS OF SUNESYS, LLC

Respectfully submitted,

SUNESYS, LLC

Alan G. Fishel
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Dated: June 8, 2009

TABLE OF CONTENTS

	Page
I. Introduction.....	1
II. Imposing a Time Period for Pole Attachment Permits will Greatly Promote Broadband Deployment and Utilization.....	2
A. Implementing A Definitive Time Period Is Unquestionably Needed.....	5
1. The Gaping Hole in the Current Rules	5
2. Timely Access to Utility Poles is Critical to the Deployment of Broadband Service.....	6
3. Pole Owners Have No Incentive to Issue Attachment Permits, and in Many Instances They Even Have Incentives to Impede Such Access	7
4. Given these Realities, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process.....	8
5. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field	8
6. The Interminable Delays that Undermine Broadband Deployment Will Come to an End Only if the Commission Imposes a Time Period on the Issuance of Pole Attachment Permits	9
B. Instituting A Time Period For Pole Attachments Is Clearly Feasible	10
1. Several States that Regulate Pole Attachments Have Already Instituted Time Periods, Proving that Such Deadlines Are Undeniably Feasible.....	10
2. Some Utilities Routinely Issue Attachment Permits Promptly, Further Proving that a Reasonable Time Period Can Be Met	12
3. The Commission's Cable Franchising Order Supports Adoption of a Time Limit for Pole Attachment Permits as well.....	12
III. Conclusion	12

SUMMARY

One important way in which the Commission can significantly advance the deployment and use of broadband services, and ensure that the provision of such services is affordable in many areas, is to take an action that many providers have been requesting for a number of years – namely, impose a deadline on the issuance of pole attachment permits. By ending the interminable delays in the issuance of such permits, the Commission will greatly advance the deployment and utilization of broadband.

In this proceeding, the Commission has specifically asked, to what extent do pole attachments “stand as impediments to further broadband deployments ...?” But the answer to that question is clear. Delays in the issuance of pole attachment permits have been a long-standing impediment to the deployment of affordable broadband services. The imposition of a deadline for the issuance of pole attachment permits is not only necessary, it is unquestionably feasible. A time limit is necessary because of the following:

1. There is a gaping hole in the current rules: there is no time limit in the Commission’s rules setting forth the period within which a pole owner has to issue an attachment permit.
2. Timely access to utility poles is critical to the deployment of broadband service – in fact, even utilities admit that providers need access to poles to provide broadband service.
3. Pole owners have no incentive to issue attachment permits, and in many instances they even have incentives to impede such access.
4. Given these realities, many pole owners take advantage of the gaping hole in the rules by causing tremendous delays in the attachment process.
5. Pole attachment delays completely derail and/or greatly delay broadband deployment, while also harming competition and unfairly tilting the playing field.
6. The interminable delays that undermine broadband deployment will come to an end only if the Commission imposes a time period on the issuance of pole attachment permits.

Moreover, a deadline is certainly feasible given the following:

1. Several states that regulate pole attachments have already instituted time periods, proving that such deadlines are undeniably feasible.
2. Some utilities routinely issue attachment permits promptly, further proving that a reasonable time period can be met.
3. The Commission's cable franchising order supports adoption of a time limit for the issuance of pole attachment permits as well.

Indeed, even utilities implicitly admit that time limits for the issuance of permits can be reasonable. It cannot be genuinely disputed that imposition of time limits for pole attachment permits can be reasonable and feasible. Indeed, given that a number of states have already imposed such deadlines, it is highly disingenuous to argue otherwise. In fact, all of the utilities' arguments regarding why they claim it would be impossible to comply with a time limit are completely undermined by a simple fact that they often ignore: they are already complying with the deadlines imposed in a number of states.

The promotion of broadband deployment and utilization is far too important to this nation to let excessive pole attachment delays continue to undermine much needed progress on the broadband front. A deadline should be instituted as soon as possible.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of _____

A National Broadband Plan for Our Future _____

)
)
) GN Docket No. 09-51
)
)

COMMENTS OF SUNESYS, LLC

Sunesys, L.L.C. ("Sunesys") hereby submits its comments in response to the Notice of Inquiry (the "NOI") in this proceeding.

I. Introduction

In the NOI, the Commission recognizes the importance of ensuring that affordable broadband service is available nationwide:

New, innovative broadband products and applications are fundamentally changing not only the way Americans communicate and work, but also how they are educated and entertained, and care for themselves and each other. [B]roadband today [is used] for everyday communications with family and friends, sharing files with co-workers when away from the office, uploading videos and photos, collaborating on articles, blogging about local happenings and world events, creating new jobs and businesses, finding nearby restaurants, shopping, banking, interacting with government, getting news and information when on the go, communicating through relay services, and countless additional applications.¹

And while the Commission recognizes the critical importance of broadband, it also acknowledges that the level of stimulus funding provided for broadband "is insufficient to support nationwide broadband deployment."² Accordingly, in addition to the broadband stimulus efforts, it is extremely important that the Commission take all

¹ NOI at ¶ 4.

² NOI at ¶ 6.

other actions that will advance broadband deployment that do not entail use of stimulus funding. By ensuring such actions are also taken, the Commission will greatly advance broadband deployment and maximize the use of broadband services to the tremendous benefit of this nation.

Congress also recognizes that the Commission must find ways to promote broadband deployment that do not entail use of stimulus funds. Indeed, Congress has requested that in this proceeding the Commission analyze the most effective and efficient mechanisms for ensuring broadband access by all people of the United States.³ Obviously, one of the most efficient means of doing so is to take action that advances broadband deployment – without utilizing federal stimulus funds.

To advance broadband deployment, of course, it is not sufficient for broadband to be available, it must also be affordable. In that vein, in this proceeding the Commission has sought comments regarding how to ensure that broadband access is actually affordable.⁴

II. Imposing a Time Period for Pole Attachment Permits will Greatly Promote Broadband Deployment and Utilization

One important way in which the Commission can advance the deployment and use of broadband services, and ensure that the provision of such services is affordable, without the use of stimulus funds (at least in many areas), is to take an action that a multitude of providers have been requesting for a number of years – namely, impose a deadline on the issuance of pole attachment permits. By ending the interminable delays in the issuance of such permits that have been described by numerous commenters in the

³ Id. at ¶ 9.

⁴ Id. at ¶¶ 9, 27.

ongoing pole attachment proceeding (the "Pole Attachment Proceeding"),⁵ the Commission will greatly advance the deployment and utilization of broadband.

In many low income areas, stimulus funding for broadband projects will still be necessary even with the pole attachment relief discussed herein. However, there are numerous areas in which broadband deployment is either non-existent or unaffordable for one reason alone – delays in the issuance of pole attachment permits.

Moreover, in this proceeding, the Commission has specifically asked, to what extent do pole attachments "stand as impediments to further broadband deployments ...?"⁶ The answer is clear: delays in the issuance of pole attachment permits stand as a considerable impediment to the deployment of broadband services. In fact, in the NOI the Commission has also requested information regarding the best way to attract risk capital to broadband infrastructure projects.⁷ One of the best ways of attracting investment is by ensuring that any impediments to the deployment and use of broadband are eliminated – and one such long-standing impediment is the interminable pole attachment delays that currently plague the ability of providers to offer affordable broadband services.

Indeed, as established in the Pole Attachment Proceeding, the imposition of a deadline for the issuance of pole attachment permits is both necessary and feasible. As discussed in Section II(A) below, a deadline is necessary because of the following:

⁵ WC Docket No. 07-245, Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments. See Section II(A)(4) below for citations to examples of some of the comments in that proceeding describing pole attachment delays.

⁶ NOI at ¶ 50.

⁷ NOI at ¶ 37

1. There is a gaping hole in the current rules: there is no time limit in the Commission's rules setting forth the period within which a pole owner has to issue an attachment permit.
2. Timely access to utility poles is critical to the deployment of broadband service – in fact, even utilities admit that providers need access to poles to provide broadband service.
3. Pole owners have no incentive to issue attachment permits, and in many instances they even have incentives to impede such access.
4. Given these realities, many pole owners take advantage of the gaping hole in the rules by causing tremendous delays in the attachment process.
5. Pole attachment delays completely derail and/or greatly delay broadband deployment, while also harming competition and unfairly tilting the playing field.
6. The interminable delays that undermine broadband deployment will come to an end only if the Commission imposes a time period on the issuance of pole attachment permits.

As discussed in Section II(B) below, a deadline is certainly feasible given that

1. Several states that regulate pole attachments have already instituted time periods, proving that such deadlines are undeniably feasible.
2. Some utilities routinely issue attachment permits promptly, further proving that a reasonable time period can be met.
3. The Commission's cable franchising order supports adoption of a time limit for the issuance of pole attachment permits as well.

For the past several years, many entities have proposed what the time limit should be for the issuance of pole attachment permits. Recently, a coalition of entities, collectively known as the Broadband & Wireless Pole Attachment Coalition ("BWPA"), proposed very reasonable deadlines, which are attached hereto in Attachment 1.⁸ Others entities have recommended even shorter deadlines.⁹ But what is abundantly clear, is that a deadline is both needed and feasible, and critical to promoting the deployment of affordable broadband services.

⁸ Ex Parte Filing of Broadband & Wireless Pole Attachment Coalition, WC Dkt. 07-245 (February 23, 2009).

⁹ See, e.g., Ex Parte Filing of Fibertech Networks, LLC and Kentucky Data Link, Inc., WC Dkt. 07-245 (April 16, 2009).

If the Commission does establish a deadline, it will finally put an end to the interminable delays in the issuance of pole attachment permits that have plagued broadband deployment for more than a decade. The Commission frequently discusses the critical importance of broadband deployment, and the need for the Commission to take every step necessary to ensure that all Americans have the opportunity to benefit from such services as soon as possible.¹⁰ Eliminating pole attachment delays is one such long overdue step the Commission must take to achieve that goal. Without such a time period, pole attachment delays will continue to drag on for years, with no end in sight to the problem, and thereby continue to undermine the public's need for affordable broadband services.

A. Implementing A Definitive Time Period Is Unquestionably Needed

In light of the following indisputable facts, a time period for the issuance of pole attachment permits is clearly needed.

1. **The Gaping Hole in the Current Rules**

It cannot be disputed that there is a gaping hole in the current Commission rules with respect to pole attachments. There is no time limit in the Commission's rules setting forth the period within which a pole owner has to issue an

¹⁰ See, e.g., Commissioner Michael Copps, Remarks at The Cable Center, Key Issue Series (Oct. 17, 2008) ("It's also about having a national strategy—a commitment at the top to get high-speed broadband out to *everyone*, no matter who they are or where they live. It's about building basic infrastructure It doesn't have to be this way. It *shouldn't* be this way. We need some real innovation and coordination to get this done. We can't get along without those bigger, fatter, more affordable pipes."); see also Commissioner Jonathan Adelstein, Remarks at the Fifth Annual Conference on Spectrum Management (Sept. 18, 2008) ("The future success of our economy will demand that we promote the expansion of communications infrastructure, as a start."); Commissioner Robert McDowell, Statement before the U.S. Senate Committee on Commerce, Science, and Transportation (Dec. 13, 2007) (We are reviewing "the Commission's ongoing effort to continue to increase the rate of broadband penetration and foster more choices for all types of consumers. We should continue to seize every opportunity to move America forward in this important area.").

attachment permit. By permitting pole owners to have an uncapped and unspecified period of time in which to issue a permit, many pole owners have caused tremendous delays in the process, thereby undermining broadband deployment. That loophole needs to be closed so that affordable broadband deployment does not continue to be undermined by interminable pole attachment delays.

2. Timely Access to Utility Poles is Critical to the Deployment of Broadband Service

It is beyond dispute that broadband providers need access to utility poles to provide their services.¹¹ In fact, even utilities admit that “electric infrastructure is important ... as a reliable physical network of poles, ducts, conduits, and rights-of-way for the deployment of communications wires and equipment.”¹²

Moreover, it is axiomatic that such access must be provided in a timely manner. The Commission itself has recognized the critical importance of such timely access: “[w]e agree with attaching entities that time is critical in establishing the rate, terms and conditions for attaching.”¹³ The Commission has made it clear that lengthy delays in resolving access issues are “not ... conducive to a pro-competitive, deregulatory

¹¹ See, e.g., Comments of Sunesys, LLC, WC Dkt. No. 07-245, at 4 (Mar. 7, 2008) (“Access to utility poles by broadband and telecommunications services is essential to the deployment of such services.”); Comments of Crown Castle, WC Dkt. No. 07-245, at 2 (Mar. 11, 2008) (“Crown Castle’s ability to exercise its Section 224 attachment rights on a timely and economic basis is critical to its ability to deploy DAS networks to provide the best, most viable solution to notorious [wireless] coverage challenges.”); Comments of T-Mobile USA, Inc., WC Dkt. No. 07-245, at 1 (Mar. 7, 2008) (“Pole attachments allow commercial mobile radio service (“CMRS”) providers to expand coverage and maintain service quality to residential customers.”). See also Comments of Edison Electric Institute and the Utilities Telecom Council, WC Dkt. 07-245, at 12 (Mar. 7, 2008) (“Safe and reliable electric service and competitive communications markets can operate in harmony for the benefit of both electric and communications industries and the public ...”).

¹² *Ex Parte Filing of the Edison Electric Institute and the Utilities Telecom Council*, WC Dkt. No. 07-245, 1, n. 3 (April 16, 2009) (“EEI Ex Parte Filing”).

¹³ *In re: Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd. 6777, 6787-88 (¶ 17) (Feb. 6, 1998) (“1998 Pole Attachments Report and Order”).

environment” and can “delay a telecommunications carrier’s ability to provide service and unnecessar[ily] obstruct the process.”¹⁴ And just last month, the Commission reiterated the critical importance of timely access to poles in connection with broadband deployment. In the Commission’s May 22, 2009 report to Congress entitled Bringing Broadband to Rural America: Report on a Rural Broadband Strategy (“May 22, 2009 Report”), the Commission stated as follows: “Timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas. We recommend that the Commission consider this factor in analyzing the record in the Pole Attachments NPRM proceeding.”¹⁵

3. Pole Owners Have No Incentive to Issue Attachment Permits, and in Many Instances They Even Have Incentives to Impede Such Access

The Commission has found that a utility’s position in a pole attachment negotiation is virtually indistinguishable from that of an incumbent local exchange carrier (“ILEC”) in an interconnection negotiation, where an ILEC has “scant, if any, economic incentive to reach agreement.”¹⁶ Thus, at best, utilities have no incentive to issue attachment permits.

Moreover, some pole owners, such as ILECs and certain utilities that provide broadband and other telecommunications services, actually compete against prospective attachers.¹⁷ Thus, these pole owners have a **disincentive** to issue attachment permits.

¹⁴ *Id.* at 6788 (¶ 17).

¹⁵ May 22 Report at ¶157.

¹⁶ 1998 Pole Attachments Report and Order at 6789 (¶21).

¹⁷ *See, e.g., In re: United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as Information Service, Memorandum Opinion and Order*, 21 FCC Rcd. 13281, 13296 (Nov. 7, 2006) (Adelstein concurring) (“In

Accordingly, pole owners either have no incentive to issue pole attachment permits, or a disincentive to do so.

Utilities' claims that they do have incentive to issue attachment permits is belied by, among other things, the stark reality that (as discussed below) many utilities delay the process interminably.

4. Given these Realities, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process

Many pole owners fail to issue permits until a year or more after receipt of an application. Commenters in the Pole Attachment Proceeding describe delays reaching, for example, 12 months,¹⁸ 15 months,¹⁹ 16 months,²⁰ 3 years,²¹ and 4 years.²² Waiting for a utility to issue the permit is often like "Waiting for Godot;" the applicant waits and waits and then waits some more, but the pole attachment license either never comes, or comes only after an interminable delay.

5. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field

Some providers are forced to forego or curtail business because of pole owners' lengthy delays in connection with pole attachments.²³ Of course, at a minimum, significant delays in pole attachments greatly delay the provision of broadband

BPL-enabled Internet access, we have a relative newcomer to the Internet access service market but an exciting technology that has the potential to be a new broadband pipe into the home.").

¹⁸ Comments of Crown Castle at 7.

¹⁹ Comments of Sunesys LLC, RM-11303, at 11 (Jan. 30, 2006) ("2006 Sunesys Comments").

²⁰ *Id.*

²¹ Comments of The DAS Forum, WC Dkt. No. 07-245, at 11 (Mar. 7, 2008).

²² Comments of T-Mobile at 7; 2006 Sunesys Comments at 11.

²³ See, e.g., 2006 Sunesys Comments at 11; Comments of Indiana Fiber Works, RM-11303, at 3 (Jan. 30, 2006).

services, which are entirely dependent on such attachments. Moreover, without timely access to poles, competition is also undermined because ILECs (and electric companies installing facilities for communications purposes) do not need to wait for a license. Even existing attachers have an unfair advantage if new attachers face interminable delays.

6. The Interminable Delays that Undermine Broadband Deployment Will Come to an End Only if the Commission Imposes a Time Period on the Issuance of Pole Attachment Permits

Utilities have all the bargaining power with respect to pole attachments permits, because they control the necessary facilities. Moreover, given this leverage, the incentives involved, and the long and undeniable history of delays here, one thing is certain: the interminable delays will only come to an end if the Commission institutes a time period for the issuance of pole attachment permits. Utilities know that, under the current system, providers cannot afford (from both a cost and delay standpoint) to file complaints each time a utility fails to act timely on an application.

Given the current situation, the Commission has two choices: It can either (i) impose a deadline on utilities with respect to the maximum length of time that they can take to issue a pole attachment permit, or (ii) continue to permit – and indeed, condone -- the dilatory actions of many utilities under the present system. But the extent to which affordable broadband services are offered in many areas will depend on the Commission's decision here. It is not enough to continue talking about furthering broadband deployment, real action must be taken. Imposing a deadline for the issuance of pole attachment permits is badly needed – and long overdue.

B. Instituting A Time Period For Pole Attachments Is Clearly Feasible

For the following reasons, it is clear that instituting a time period for the issuance of pole attachments is feasible.

1. Several States that Regulate Pole Attachments Have Already Instituted Time Periods, Proving that Such Deadlines Are Undeniably Feasible

A number of states, including New York²⁴ and Connecticut,²⁵ have already instituted time periods for the issuance of pole attachments. Not surprisingly, utilities cannot explain how such deadlines are workable in states that have instituted time periods, but not elsewhere. Indeed, utilities even admit that the timelines imposed in New York and Connecticut were issued only after the regulatory bodies involved conducted a thorough and detailed analysis of the issue.²⁶ Thus, even utilities admit that deadlines by states were imposed only after careful consideration of the matter and a strong recognition that timelines are needed.²⁷

The logic behind the imposition of state-adopted time periods is equally compelling everywhere. As the Connecticut DPUC (90 day deadline, 125 days for pole replacements) stated, a longer time period "is not reflective of today's customer-driven

²⁴ See *In re: Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement*, Case 03-M-0432, 2004 N.Y. PUC LEXIS 306 (N.Y.P.S.C. 2004) ("New York Order").

²⁵ See DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase 1, *Decision*, Dkt. No. 07-02-13, 2008 Conn. PUC LEXIS 90 (Conn. P.U.C. 2008) ("Connecticut Order").

²⁶ Ex Parte Filing of Allegheny Power, et. al, WC Dkt. 07-245 at 17,18 (May 1, 2009) ("Allegheny Power Ex Parte Filing").

²⁷ Some utilities claim that the Commission lacks the power to impose a time limit. This argument is frivolous. See, e.g., Ex Parte Filing of Tampa Electric, et. al. WC Dkt. 07-245 at 2-3 (April 13, 2009) ("Tampa Electric Ex Parte Filing"). The Commission has the authority to establish the rates, terms and conditions for access. Obviously, one of those terms is the length of time before access is obtained. If the Commission is powerless to do so (which is clearly not the case), utilities could take advantage of the rules forever with virtual impunity since providers do not have the resources to bring a complaint every time a utility fails to provide a permit in a timely fashion. Moreover, complaints generally just cause further delays as well.

telecommunications market. Connecticut customers ... deserve the most efficient delivery of services, and thus the process ... must be streamlined.”²⁸ But *all* consumers in the country deserve the efficient delivery of services. Not having a time period under the Commission’s rules is completely at odds with today’s customer-driven market, the Commission’s broadband deployment goals, and the public’s need for these services.

Indeed, while utilities expressly oppose imposition of any deadline, even they implicitly admit that time limits for the issuance of permits can be reasonable. One group of utilities argued that “in Utah, a 120-day make-ready [deadline] may represent a better balance” between the ability of the pole owner to complete the work and the need for it to be finished without undue delay.²⁹ Another group of utilities pointed to Vermont, which has imposed time limits, as a state that “has established more reasonable deadlines.”³⁰ While the BWPA members disagree that the length of the time periods imposed in Utah and Vermont are necessary (i.e., BWPA members believe the time periods should be shorter), what it appears that everyone agrees to either explicitly or implicitly is this: the imposition of time limits for pole attachment permits can be reasonable and feasible. Indeed, given that a number of states have already imposed such time limits, it is highly disingenuous to argue otherwise.

In fact, all of the utilities’ other arguments regarding why they claim it would be impossible to comply with a deadline are completely undermined by a simple fact that they often ignore: they are already complying with the time limits imposed in a number of states.

²⁸ Connecticut Order at *50.

²⁹ EEI Ex Parte Filing at 8.

³⁰ Allegheny Power Ex Parte Filing at 8-9.

2. Some Utilities Routinely Issue Attachment Permits Promptly, Further Proving that a Reasonable Time Period Can Be Met

The disparity in the time periods for utilities to grant access to their poles is striking. Some utilities provide access within 3 months or less after receiving an application, while others take more than five times as long (i.e., over 15 months). Another utility takes approximately 4 years to complete the work. It does not take 15 months, let alone 4 years, to complete the make-ready necessary for a pole attachment. The difference in these times (varying from less than 3 months to 4 years) is not a safety issue. It is not an engineering or reliability issue. It is a harm to broadband deployment issue -- and a very serious one at that.

3. The Commission's Cable Franchising Order Supports Adoption of a Time Limit for Pole Attachment Permits as well

The Commission imposed a time limit for local governments to respond to cable applications because broadband deployment was being delayed, the process sometimes took a year or more, and complaints were not adequate remedies since they added additional delay and expense.³¹ Those same findings apply to pole attachment applications. In fact, a stronger case exists for a time limit with respect to pole attachment permits because private entities are causing the delays, rather than local governments who generally want more competition.

III. Conclusion

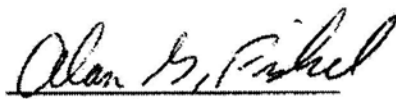
Implementation of a time period for issuance of pole attachments is unquestionably needed, feasible, and long overdue. Interminable pole attachment delays

³¹ See generally *In re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101 (Mar. 5, 2007).

that greatly undermine broadband and wireless deployment cannot and should not be tolerated any longer. The promotion of broadband deployment and utilization is far too important to this nation to let excessive pole attachment delays continue to undermine much needed progress on the broadband front. A deadline should be instituted as soon as possible.

Respectfully submitted,

SUNESYS, LLC

A handwritten signature in cursive script, appearing to read "Alan G. Fishel", is written over a horizontal line.

Alan G. Fishel
Arent Fox LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Dated: June 8, 2009

Attachment 1

BWPA PROPOSAL

I. General Rule

A. From the date of the submission of the application, a utility will have the following number of days to issue the pole attachment permit:

- 105 days for poles where no pole replacement is necessary
- 135 days for poles where pole replacement is necessary

B. Any delays in payment by the attacher would extend the utility's deadline by the amount of the delay.

II. Component Parts of the General Rule

A. 45 Days for Make-Ready Estimates — Except where a utility properly and timely denies a pole attachment application pursuant to 47 C.F.R. 1.1403, a utility shall provide make-ready estimates to the attacher within 45 days after receipt of the attacher's application.

B. 60/90 Days for Make-Ready Work Completion --- A utility shall complete the make-ready work and issue the attachment permit within 60 days when no pole replacement is necessary, or within 90 days when pole replacement is necessary.

III. If the Rule is Violated

If a utility violates the rules (i.e., fails to complete the make-ready work and issue the pole attachment permit within the time period specified by the rules), the attacher may

A. perform the survey and/or make-ready work using a utility-approved independent contractor, or any other contractor who has the same qualifications in terms of training as the utility's own workers, or

B. commence an expedited complaint proceeding under which the utility shall be liable to the attacher for attorneys' fees, and an amount equal to 1/100 of the total make-ready and survey charges multiplied by the amount of days the utility is late, unless the attacher can prove that actual damages exceed that amount.

In order to facilitate the use of this remedy and minimize the number of complaints filed with the Commission regarding delays, each utility should be required to

provide a list of all contractors, if any, currently permitted to work on the utility's aerial plant.

The BWPA Proposal is Based on New York and Connecticut Laws Already in Effect

The BWPA Proposal is based on the state laws of New York and Connecticut. However, the BWPA Proposal is even more generous to utilities than either of those state laws.

New York Law

Under New York law, from the date of the submission of the application, a utility will have the following number of days to issue the pole attachment permit (i.e., complete the make-ready work):

- 104 days for poles where no pole replacement is necessary
- 104 days for poles where pole replacement is necessary

In addition, any delays in payment by the attacher would extend the utility's deadline by the amount of the delay.

Connecticut Law

Under Connecticut law, from the date of the submission of the application, a utility will have the following number of days to issue the pole attachment permit (i.e., complete the make-ready work):

- 90 days for poles where no pole replacement is necessary
- 125 days for poles where pole replacement is necessary

In addition, any delays in payment by the attacher would extend the utility's deadline by the amount of the delay.

Comparison of BWPA Proposal to New York Law and Connecticut Law

	No Pole Replacement	Pole Replacement
New York	104 days	104 days
Connecticut	90 days	125 days
BWPA Proposal	105 days	135 days

Accordingly, under the BWPA Proposal:

1. Where There is No Pole Replacement, Essentially Adopts New York's Time Period, which Time Period is Two Weeks Longer than the Connecticut Deadline.
2. Where There is a Pole Replacement, Adopts a Time Period 10 Days Longer than Connecticut's Deadline, and 31 Days Longer than New York's Time Period.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)

A National Broadband Plan for Our Future)
_____)

GN Docket No. 09-51

REPLY COMMENTS OF SUNESYS, LLC

Respectfully submitted,

SUNESYS, LLC

Alan G. Fishel
Jeffrey E. Rummel
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Dated: July 21, 2009

TABLE OF CONTENTS

	Page
I. Imposing a Time Period for Pole Attachment Permits will Greatly Promote Broadband Deployment and Utilization.....	1
II. Imposing a Time Period for Pole Attachment Permits is Both Necessary and Feasible	3
A. Utilities Cannot Refute that the Adoption of a Time Period for the Issuance of Pole Attachments is Unquestionably Needed	5
1. There is a Gaping Hole in the Current Rules	5
2. Timely Access to Utility Poles is Critical to the Deployment of Broadband Service	6
3. Pole Owners Have No Incentive to Issue Attachment Permits, and in Many Instances They Even Have Incentives to Impede Such Access	7
4. Given these Realities, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process.....	8
5. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field	9
6. The Interminable Delays that Undermine Broadband Deployment Will Come to an End Only if the Commission Imposes a Time Period on the Issuance of Pole Attachment Permits	10
B. Utilities Cannot Refute that Imposing A Time Period For Pole Attachments Is Clearly Feasible	10
1. Several States that Regulate Pole Attachments Have Already Adopted Pole Attachment Deadlines, Proving that Such Deadlines Are Undeniably Feasible.....	11
2. Some Utilities Routinely Issue Attachment Permits Promptly, Further Proving that a Reasonable Time Period Can Be Met	13
3. The Commission's Cable Franchising Order Supports Adoption of a Time Limit for Pole Attachment Permits as well.....	14
III. Conclusion	14

SUMMARY

The Commission can significantly advance the deployment and use of broadband services by taking an action that many providers have been requesting for a number of years – namely, imposing a deadline on the issuance of pole attachment permits.

In this proceeding, the Commission has specifically asked, to what extent do pole attachments “stand as impediments to further broadband deployments ...?” And the answer is clear. Delays in the issuance of pole attachment permits have been a long-standing, and tremendous, impediment to the deployment of affordable broadband services. The imposition of a deadline for the issuance of pole attachment permits is not only necessary, it is unquestionably feasible. A time limit is necessary because of the following:

1. There is a gaping hole in the current rules: there is no time limit in the Commission’s rules setting forth the period within which a pole owner has to issue an attachment permit.
2. Timely access to utility poles is critical to the deployment of broadband service – in fact, even the utilities admit that providers need access to poles to provide broadband service.
3. Pole owners have no incentive to issue attachment permits, and in many instances they even have incentives to impede such access.
4. Given these realities, many pole owners take advantage of the gaping hole in the rules by causing tremendous delays in the attachment process.
5. Pole attachment delays completely derail and/or greatly delay broadband deployment, while also harming competition and unfairly tilting the playing field.
6. The interminable delays that undermine broadband deployment will come to an end only if the Commission imposes a time period on the issuance of pole attachment permits.

Moreover, a deadline is certainly feasible given the following:

1. Several states that regulate pole attachments have already adopted pole attachment deadlines, proving that such deadlines are undeniably feasible.

2. Some utilities routinely issue attachment permits promptly, further proving that a reasonable time period can be met.
3. The Commission's cable franchising order supports adoption of a time limit for the issuance of pole attachment permits as well.

The comments of utilities opposing any deadlines establish that they have no effective rebuttal. It is so painfully obvious that a deadline for pole attachments is needed and feasible that the utilities' responses either do not pass the "straight face test," or in some instances effectively admit that deadlines are appropriate and can be reasonable.

For example, all of the utilities' arguments regarding why they claim it would be impossible to comply with a time limit are completely undermined by one simple fact: they are already complying with pole attachment deadlines imposed in a number of states. In addition, utilities completely and conveniently ignore the record before the Commission in its ongoing pole attachment proceeding, which record specifies a plethora of examples of pole attachment delays that harm many companies and the public. While utilities completely ignore the record on this point, the Commission certainly should not.

Moreover, utilities do admit that pole attachment deadlines can be reasonable, pointing to certain states that have enacted deadlines that they claim create a "better balance" of the needs of the parties, or are "reasonable." While Sunesys strongly disagrees that the deadlines need to be anywhere near as long as they are in the states that utilities believe have reasonable deadlines (and Sunesys believes states such as New York and Connecticut have more appropriate deadlines), it is clear that everyone either explicitly or implicitly admits that deadlines can be reasonable.

In short, the promotion of broadband deployment and utilization is far too important to let excessive pole attachment delays continue to undermine much needed progress on the broadband front. A deadline should be instituted as soon as possible.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

A National Broadband Plan for Our Future)

)
)
) GN Docket No. 09-51
)

REPLY COMMENTS OF SUNESYS, LLC

Sunesys, LLC ("Sunesys") hereby submits its reply comments in response to the Notice of Inquiry (the "NOI") in this proceeding.

I. Imposing a Time Period for Pole Attachment Permits will Greatly Promote Broadband Deployment and Utilization

In this proceeding, the Commission has

1. Recognized the critical importance of ensuring that affordable broadband service is available nationwide, while also acknowledging that the level of stimulus funding provided for broadband is not sufficient by itself to support nationwide broadband deployment,¹ and

2. Specifically asked, to what extent do pole attachments "stand as impediments to further broadband deployments ...?"²

The above concepts are interrelated. First, given that stimulus funds alone will not ensure affordable broadband access throughout the nation, the Commission, in order to meet its goals regarding broadband utilization, must take steps that will advance

¹ NOI at ¶¶ 6.

² NOI at ¶ 50.

broadband deployment that do not require use of stimulus funding. By doing so, the Commission will not only advance broadband deployment and utilization in this country, but it will also comply with Congress' clear mandate that the Commission analyze the most effective and efficient mechanisms for ensuring broadband access by all people of the United States.³ Obviously, one of the most efficient means of advancing broadband deployment is to take action that advances such deployment – without utilizing federal stimulus funds.

Second, by asking whether pole attachments stand as an impediment to broadband deployment, the Commission apparently recognizes what numerous providers unfortunately know all too well: delays in the issuance of pole attachment permits are a tremendous impediment to the deployment of affordable broadband services. Numerous commenters in the pole attachment proceeding (the "Pole Attachment Proceeding"),⁴ have described interminable delays in the issuance of pole attachments, which delays have been ongoing for many, many years. The question remains: **How many more years do providers have to suffer through such interminable delays, and their customers either have to wait to receive affordable broadband services or never receive them at all, before the Commission finally does what it is so badly needed and long overdue: place a time limit on the issuance of pole attachment permits?**

³ Id. at ¶ 9.

⁴ WC Docket No. 07-245, Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments. See Section II(A)(4) below for citations to examples of some of the comments in that proceeding describing pole attachment delays.

By imposing such a deadline, the Commission will advance the deployment and use of broadband services, and ensure that the provision of such services is affordable, without the use of stimulus funds (at least in many areas).⁵

II. Imposing a Time Period for Pole Attachment Permits is Both Necessary and Feasible

For the past several years, many entities have proposed what the time limit should be for the issuance of pole attachment permits. A group of entities known as the Broadband & Wireless Pole Attachment Coalition ("BWPA") have proposed very reasonable deadlines, which are attached to Sunesys' initial comments in this proceeding.⁶ Others entities have recommended even shorter deadlines.⁷ But what is abundantly clear, is that a deadline is both needed and feasible, and critical to promoting the deployment of affordable broadband services.

If the Commission does establish a deadline, it will finally put an end to the interminable delays in the issuance of pole attachment permits that have plagued broadband deployment for more than a decade. The Commission frequently discusses the critical importance of broadband deployment, and the need for the Commission to take every step necessary to ensure that all Americans have the opportunity to benefit from such services as soon as possible.⁸ Eliminating pole attachment delays is one such long overdue step the Commission must take to achieve that goal. Without such a time

⁵ In many low income areas, stimulus funding for broadband projects will still be necessary even with the pole attachment relief discussed herein. However, there are numerous areas in which broadband deployment is either non-existent or unaffordable for one reason alone – delays in the issuance of pole attachment permits.

⁶ See Sunesys Comments, GN 09-51 ("Sunesys Initial Comments"), Attachment 1 (June 8, 2009).

⁷ See, e.g., Ex Parte Filing of Fibertech Networks, LLC and Kentucky Data Link, Inc., WC Dkt. 07-245 (April 16, 2009).

⁸ See Sunesys Initial Comments at 5, n. 10.

period, pole attachment delays will continue to drag on for years, with no end in sight to the problem, and thereby continue to undermine the public's need for affordable broadband services.

In the Pole Attachment Proceeding, BWPA demonstrated why the implementation of a deadline for pole attachment permits is badly needed and clearly feasible. Sunesys reiterated these same points in its Initial Comments in this proceeding.

On the other hand, the comments of utilities opposing any deadlines, both in this proceeding and the Pole Attachment Proceeding, establish that they have no effective rebuttal. It is so painfully obvious that a deadline for pole attachments is needed and feasible that the utilities' responses either do not pass the "straight face test," or in some instances such replies effectively admit that Sunesys and BWPA are correct. Set forth below are the reasons why a pole attachment deadline is necessary and feasible (which are more fully described in Sunesys' Initial Comments in this proceeding and in BWPA's submission in the Pole Attachment Proceeding), the utilities' responses to those arguments, and, where necessary, Sunesys' reply to the utilities' responses.

As discussed below, a deadline for the issuance of pole attachment permits is necessary for the following reasons:

1. There is a gaping hole in the current rules: there is no time limit in the Commission's rules setting forth the period within which a pole owner has to issue an attachment permit.
2. Timely access to utility poles is critical to the deployment of broadband service – in fact, even the utilities admit that providers need access to poles to provide broadband service.
3. Pole owners have no incentive to issue attachment permits, and in many instances they even have incentives to impede such access.
4. Given these realities, many pole owners take advantage of the gaping hole in the rules by causing tremendous delays in the attachment process.

5. Pole attachment delays completely derail and/or greatly delay broadband deployment, while also harming competition and unfairly tilting the playing field.
6. The interminable delays that undermine broadband deployment will come to an end only if the Commission imposes a time period on the issuance of pole attachment permits.

As also discussed below, a deadline is certainly feasible given that:

1. Several states that regulate pole attachments have already adopted pole attachment deadlines, proving that such deadlines are undeniably feasible.
2. Some utilities routinely issue attachment permits promptly, further proving that a reasonable time period can be met.
3. The Commission's cable franchising order supports adoption of a time limit for the issuance of pole attachment permits as well.

A. Utilities Cannot Refute that the Adoption of a Time Period for the Issuance of Pole Attachments is Unquestionably Needed

In light of the following indisputable facts, a time period for the issuance of pole attachment permits is clearly needed.

1. There is a Gaping Hole in the Current Rules

There is no time limit in the Commission's rules setting forth the period within which a pole owner has to issue an attachment permit. Pole owners have an uncapped and unspecified period of time in which to issue an attachment permit.

Utility Response: Utilities admit that there is no time limit in the Commission's rules by which a pole owner has to issue an attachment permit, and that pole owners have an uncapped and unspecified period of time in which to issue a permit.

2. **Timely Access to Utility Poles is Critical to the Deployment of Broadband Service**

Broadband providers need access to utility poles to provide their services,⁹ and such access must be provided in a timely manner.¹⁰ As the Commission has recognized, lengthy delays in resolving access issues are “not ... conducive to a pro-competitive, deregulatory environment” and can “delay a telecommunications carrier’s ability to provide service and unnecessar[ily] obstruct the process.”¹¹

Utility Response: Utilities acknowledge that providers need access to utility poles in order to provide broadband services, stating that “electric infrastructure is important ... as a reliable physical network of poles, ducts, conduits, and rights-of-way for the deployment of communications wires and equipment.”¹²

⁹ See, e.g., Comments of Sunesys, LLC, WC Dkt. No. 07-245, at 4 (Mar. 7, 2008) (“Access to utility poles by broadband and telecommunications services is essential to the deployment of such services.”); Comments of Crown Castle, WC Dkt. No. 07-245, at 2 (Mar. 11, 2008) (“Crown Castle’s ability to exercise its Section 224 attachment rights on a timely and economic basis is critical to its ability to deploy DAS networks to provide the best, most viable solution to notorious [wireless] coverage challenges.”); Comments of T-Mobile USA, Inc., WC Dkt. No. 07-245, at 1 (Mar. 7, 2008) (“Pole attachments allow commercial mobile radio service (“CMRS”) providers to expand coverage and maintain service quality to residential customers.”).

¹⁰ *In re: Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd. 6777, 6787-88 (¶ 17) (Feb. 6, 1998) (“1998 Pole Attachments Report and Order”) (the Commission “agree[s] with attaching entities that time is critical in establishing the rate, terms and conditions for attaching.”)

¹¹ *Id.* at 6788 (¶ 17). In addition, in the Commission’s May 22, 2009 report to Congress entitled *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, the Commission stated as follows: “Timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas. May 22 Report at ¶157

¹² See, e.g., *Ex Parte Filing of the Edison Electric Institute and the Utilities Telecom Council*, WC Dkt. No. 07-245, 1, n. 3 (April 16, 2009) (“UTC Ex Parte Filing”). See also Comments of Edison Electric Institute and the Utilities Telecom Council, WC Dkt. 07-245, at 12 (Mar. 7, 2008) (“Safe and reliable electric service and competitive communications markets can operate in harmony for the benefit of both electric and communications industries and the public . . .”).

3. Pole Owners Have No Incentive to Issue Attachment Permits, and in Many Instances They Even Have Incentives to Impede Such Access

As the Commission recognizes, a utility's position in a pole attachment negotiation is virtually indistinguishable from that of an incumbent local exchange carrier ("ILEC") in an interconnection negotiation, where an ILEC has "scant, if any, economic incentive to reach agreement."¹³ Thus, at best, utilities have no incentive to issue attachment permits.

Moreover, some pole owners, such as ILECs and certain utilities that provide broadband and other telecommunications services, compete against prospective attachers.¹⁴ Thus, these pole owners have a competitive disincentive to issue attachment permits. Accordingly, pole owners either have no incentive to issue pole attachment permits, or a disincentive to do so.

Utility Response: Utilities Telecom Council and the Edison Electric Institute (collectively, "UTC") argue in this proceeding that "[u]tilities have every incentive to complete make ready, because it is in their interests to ensure that pole attachments are made safely."¹⁵ UTC also claims that utilities are effectively deterred from delaying the process because of concerns a complaint will be filed.¹⁶

¹³ 1998 Pole Attachments Report and Order at 6789 (¶21).

¹⁴ See, e.g., *In re: United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as Information Service*, *Memorandum Opinion and Order*, 21 FCC Rcd. 13281, 13296 (Nov. 7, 2006) (Adelstein concurring) ("In BPL-enabled Internet access, we have a relative newcomer to the Internet access service market but an exciting technology that has the potential to be a new broadband pipe into the home.").

¹⁵ Comments of Utilities Telecom Council and the Edison Electric Institute, GN Docket No. 09-51, at 18 (June 8, 2009) ("UTC Comments").

¹⁶ *Id.* at 19.

Reply to Utility Response: UTC's arguments lack any merit. As to its first argument, if a utility delays the issuance of a pole attachment, the attachment is not installed unsafely in the interim – it is just not installed at all. Accordingly, utilities do not have an incentive to install attachments in a timely manner to prevent the installation of unsafe attachments. With respect to UTC's second argument, the facts undermine its claim. Not only has the Commission recognized that utilities have no incentive to perform pole attachments, but the stark reality that utilities often interminably delay the process makes that abundantly clear. If utilities were truly concerned about such complaints, they would not cause great delays. Moreover, as no one can dispute, companies rarely have an incentive to help their competitors. So, where an ILEC or utility competes against an attacher, the pole owner actually has a disincentive (as opposed to just no incentive) to issue the permit in a timely fashion.

4. Given these Realities, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process

Many pole owners fail to issue permits until a year or more after receipt of an application. Commenters in the Pole Attachment Proceeding describe delays reaching a year or more, including, for example, delays of 12 months,¹⁷ 15 months,¹⁸ 16 months,¹⁹ 3 years,²⁰ and 4 years.²¹

¹⁷ Comments of Crown Castle at 7.

¹⁸ Comments of Sunesys LLC, RM-11303, at 11 (Jan. 30, 2006) ("2006 Sunesys Comments").

¹⁹ *Id.*

²⁰ Comments of The DAS Forum, WC Dkt. No. 07-245, at 11 (Mar. 7, 2008).

²¹ Comments of T-Mobile at 7; 2006 Sunesys Comments at 11.

Utility Response: UTC claims that there is no evidence of any delays in the issuance of pole attachments.²² Allegheny Power and a few other utilities (collectively "Allegheny Power"), in a joint filing, claim that the record does not support implementation of a pole attachment deadline.²³

Reply to Utility Response: Both UTC and Allegheny Power completely and conveniently ignore the record before the Commission that specifies a plethora of examples of pole attachment delays, which harm many companies and the public. Pole attachment delays have been ongoing for numerous years, and neither UTC nor Allegheny Power provide any facts whatsoever to contradict that undeniable, and unfortunate, truth. While utilities completely ignore the record on this point, the Commission certainly should not.

5. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field

Some providers are forced to forego or curtail business because of pole owners' lengthy delays in connection with pole attachments.²⁴ At a minimum, significant delays in pole attachments greatly delay the provision of broadband services. Moreover, competition is also undermined because ILECs (and electric companies installing facilities for communications purposes) do not need to wait for a license. Even existing attachers have an unfair advantage if new attachers confront interminable delays.

Utility Response: Same as Subsection No. 4 above.

²² UTC Comments at 20.

²³ Comments of the Coalition of Concerned Utilities, GN Docket No. 09-51, Exhibit J, at 17-18 (June 8, 2009), ("Allegheny Power Comments, Exhibit J").

²⁴ See, e.g., 2006 Sunesys Comments at 11; Comments of Indiana Fiber Works, RM-11303, at 3 (Jan. 30, 2006).

Reply to Utility Response: Same as Subsection No. 4 above.

6. **The Interminable Delays that Undermine Broadband Deployment Will Come to an End Only if the Commission Imposes a Time Period on the Issuance of Pole Attachment Permits**

Utilities have all the bargaining power with respect to pole attachments permits, because they control the necessary facilities. Moreover, given this leverage, the incentives involved, and the long and undeniable history of delays in this area, one thing is certain: the interminable delays will only come to an end if the Commission institutes a time period for the issuance of pole attachment permits.

Utility Response: All pole attachment delays should be addressed through complaint proceedings at the Commission.

Reply to Utility Response: Utilities ignore the fact that the complaint process has been in effect for years, and is still in effect today, and yet the delays persist and are still interminable. The complaint process alone is wholly insufficient. Under the current system, providers simply cannot afford (from both a cost and delay standpoint) to file complaints each time a utility fails to act timely on a pole attachment application. The complaint process does not eliminate the delays – it merely results in further costs and further delays. To say the least, reliance on the complaint process is not the answer.

B. **Utilities Cannot Refute that Imposing A Time Period For Pole Attachments Is Clearly Feasible**

In light of the following indisputable facts, it is clear that adopting a time period for the issuance of pole attachments is feasible.

1. **Several States that Regulate Pole Attachments Have Already Adopted Pole Attachment Deadlines, Proving that Such Deadlines Are Undeniably Feasible**

A number of states, including New York²⁵ and Connecticut,²⁶ have already instituted time periods for the issuance of pole attachments. Not surprisingly, utilities cannot explain how such deadlines are workable in states that have adopted deadlines, but not elsewhere.

In addition, the logic behind the imposition of state-adopted time periods is equally compelling everywhere. As the Connecticut DPUC (90 day deadline, 125 days for pole replacements) stated, a longer time period “is not reflective of today’s customer-driven telecommunications market. Connecticut customers ... deserve the most efficient delivery of services, and thus the process ... must be streamlined.”²⁷ But *all* consumers in the country deserve the efficient delivery of services. Not having a time period under the Commission’s rules is completely at odds with today’s customer-driven market, the Commission’s broadband deployment goals, and the public’s need for these services.

Utility Response: UTC argues that the “fact that some states have adopted deadlines or that some utilities have met these timelines proves nothing about whether the Commission could or should impose such requirements.”²⁸ UTC further argues that any deadline would cause major safety concerns and that deadlines are not feasible because the amount of time it takes to issue an attachment varies depending on

²⁵ See *In re: Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement*, Case 03-M-0432, 2004 N.Y. PUC LEXIS 306 (N.Y.P.S.C. 2004) (“New York Order”).

²⁶ See DPUC Review of the State’s Public Service Company Utility Pole Make-Ready Procedures – Phase 1, *Decision*, Dkt. No. 07-02-13, 2008 Conn. PUC LEXIS 90 (Conn. P.U.C. 2008) (“Connecticut Order”).

²⁷ Connecticut Order at *50.

²⁸ UTC Comments at 19.

certain factors.²⁹ In the Pole Attachment Proceeding itself, UTC does implicitly admit that time limits for the issuance of permits can be reasonable. UTC has argued in that proceeding that “in Utah, a 120-day make-ready [deadline] may represent a better balance” between the ability of the pole owner to complete the work and the need for it to be finished without undue delay.³⁰

Allegheny Power states that while it is true that states such as Connecticut and New York have imposed deadlines on the issuance of pole attachment permits, they did so only after conducting an extensive analysis to ensure that deadlines on the issuance of pole attachments is feasible. Like UTC, Allegheny Power admits that deadlines can be reasonable, pointing to Vermont, which has imposed time limits, as a state that “has established more reasonable deadlines.”³¹

Reply to Utility Response: As discussed above, utilities have effectively conceded that deadlines for pole attachment permits can be reasonable. Moreover, the fact that New York and Connecticut imposed pole attachment deadlines only after a thorough review and analysis to ensure the feasibility of such deadlines simply further establishes that pole attachment deadlines are eminently feasible. In addition, there is absolutely no merit to UTC’s assertion that state-imposed deadlines are irrelevant here, because such deadlines prove both that workable pole attachment deadlines (i) can be established; and (ii) that they do not cause safety problems.

²⁹ *Id.*

³⁰ *Ex Parte Filing of the Edison Electric Institute and the Utilities Telecom Council*, WC Dkt. No. 07-245, at 8 (April 16, 2009).

³¹ Allegheny Power Comments, Exhibit J at 8-9.

While BWPA disagrees that the length of the time periods imposed in Utah and Vermont are necessary (which are the states that UTC and Alleghany Power, respectively, believe have reasonable deadlines), what it appears that everyone agrees to - either explicitly or implicitly - is this: the imposition of time limits for pole attachment permits can be reasonable and feasible. Indeed, given that a number of states have already imposed such time limits, no one can credibly argue otherwise.

In fact, all of the utilities' arguments regarding why they claim it would be impossible to comply with a deadline are completely undermined by a simple fact that they often ignore: they are already complying with the time limits imposed in a number of states.

2. Some Utilities Routinely Issue Attachment Permits Promptly, Further Proving that a Reasonable Time Period Can Be Met

The disparity in the time periods for utilities to grant access to their poles is tremendous. Some utilities provide access within 3 months or less after receiving an application, while others take more than five times as long (i.e., over 15 months), and another utility takes approximately 4 years to complete the work. It does not take 15 months, let alone 4 years, to complete the make-ready necessary for a pole attachment. The difference in these times is not a safety, engineering or reliability issue -- it is a harm to broadband deployment issue, and a very serious one at that.

Utility Response: Utilities admit that some utilities provide pole attachment permits in a timely fashion, but UTC claims this is irrelevant.³²

Reply to Utility Response: The fact that some utilities issue pole attachments in a timely manner just further establishes that it can readily be done.

3. **The Commission's Cable Franchising Order Supports Adoption of a Time Limit for Pole Attachment Permits as well**

The Commission imposed a time limit for local governments to respond to cable applications because broadband deployment was being delayed, the process sometimes took a year or more, and complaints were not adequate remedies since they added additional delay and expense.³³ Those same findings apply to pole attachment applications. In fact, a stronger case exists for a time limit with respect to pole attachment permits because private entities are causing the delays, rather than local governments who generally want more competition.

Utility Response: None

III. **Conclusion**

Implementation of a time period for the issuance of pole attachments is unquestionably needed, feasible, and long overdue. Interminable pole attachment delays greatly undermine broadband and wireless deployment, and such delays cannot and should not be tolerated any longer. The promotion of broadband deployment and utilization is far too important to this nation to let excessive pole attachment delays continue to undermine much needed progress on the broadband front. The Commission

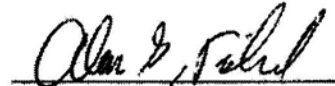
³² UTC Comments at 19.

³³ See generally *In re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101 (Mar. 5, 2007).

should adopt a deadline as soon as possible. In fact, the extent to which affordable broadband services are offered in many areas will depend on the Commission's decision here.³⁴

Respectfully submitted,

SUNESYS, LLC



Alan G. Fishel

Jeffrey E. Rummel

Arent Fox LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5339

(202) 857-6000

Dated: July 21, 2009

³⁴ In the NOI, the Commission has also requested information regarding the best way to attract risk capital to broadband infrastructure projects. NOI at ¶ 37. One of the best ways of attracting investment is by ensuring that any impediments to the deployment and use of broadband are eliminated – and one such long-standing impediment is the interminable pole attachment delays that currently plague the ability of providers to offer affordable broadband services.